PUBLIC PROSECUTOR

v

LAM PENG HOA & ANOR

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE J
[CRIMINAL TRIAL NO: 58-8-1994]
25 JUNE 1996

CRIMINAL PROCEDURE: *Charge – Amendment of charge – Court substitutes charge under s 39B of Dangerous Drugs Act 1952 with charge under s 12(2) of same Act*

CRIMINAL PROCEDURE: *Report – Government chemist's report served on defence pursuant to s 399 of Criminal Procedure Code – No notice given by defence requesting attendance of chemist – Whether contents acceptable*

DANGEROUS DRUGS: *Section 39B of Dangerous Drugs Act 1952 – Chemist described drugs as "Cannabis as defined in the Dangerous Drugs Act" without referring to s 2(1) – Whether possible that chemist adverted to 'Cannabis Indian Hemp' in Part III of First Schedule – Subsequent amendment of charge by Court to a charge under s 12(2) of the DDA – Accused persons arrested in house whilst handling drugs – Whether possession established – Mental element and physical element necessary for possession – Whether accused persons guilty of possession*

DANGEROUS DRUGS: *Trafficking in cannabis – Presumption of trafficking under s 37(da) of Dangerous Act 1952 – Whether presumption arises in respect of cannabis (Indian Hemp)*

EVIDENCE: *Parol evidence rule – Evidence Act 1950, s 91 – Chemist's report admitted – Proof of the terms of chemist report to be by evidence of the report itself and no other evidence*

EVIDENCE: *Witness – Application to call chemist as prosecution witness – Whether allowed where chemist's report already admitted – Whether permissible by the operation of s 91 of Evidence Act 1950*

EVIDENCE: *Hearsay – Statement by person not called – Admissibility dependent on condition precedent in s 32(1) of the Evidence Act 1950 Whether maker cannot be found – Whether maker's attendance cannot be procured without unreasonable delay or expense – Whether diligent search and reasonable exertion were made to procure the witness's attendance – What amounts to diligent search and reasonable exertion*

EVIDENCE: *Interpretation – Section 32(1)(i) and (j) of the Evidence Act 1950 – Whether these subsections ought to be read conjunctively or disjunctively*

INTERPRETATION: *Canon of construction – Where there is doubt as to whether accused committed an offence in lower or higher degree of seriousness a finding in the lower degree ought to be made*

Both the accused were arrested in a room on the upper floor of a house wherein they were found sitting on the floor holding a packet of plant material each. Upon seeing the police, they dropped the said packets onto newspapers which were spread on the floor and which contained more of the plant material. Other incriminating evidence were also found on the floor.

Two other occupants who were in other rooms at the time were also arrested. A lady who was identified as the person renting the house, was downstairs at the time of the arrest and a statement under s 112 of the Criminal Procedure Code ('CPC') was taken from her. However, her attendance in Court could not be procured and thus the prosecution sought to tender her statement as evidence pursuant to s 32(1)(i) of the Evidence Act 1950 ('EA'). In invoking s 32(1)(i), the prosecution contended that the witness could not be found and further to this stated that the police had attempted but failed to locate the witness.

The plant material was analysed by the government chemist whose report identified it as cannabis as defined in the Dangerous Drugs Act 1952 ('DDA') with a total weight of 663 grammes. The report did not state, however, that the material analysed was cannabis as specifically defined in s 2 of the DDA and thus the prosecution applied to call the chemist to clarify the report. The prosecution stated that the purpose of this was to ask the chemist to explain the conduct of her analysis in the drug.

Both the accused persons were charged jointly under s 39B of the DDA for the offence of trafficking in 663 grammes of cannabis. This section prescribes the mandatory death sentence. However, at the close of the prosecution's case, the Court found it necessary to amend the charge against both the accused persons to one of possession *simpliciter* of cannabis ('Indian Hemp') under s 12(2) of the DDA which imposes a maximum punishment of five years. Upon the charge being amended, the accused persons were called to enter their defence but they chose to remain silent.

The two preliminary issues that the Court had to address were, whether the prosecution can call the chemist to clarify the report he had made and whether the caution statement could be admitted under s 32(1)(i) of the EA. The main issue, meanwhile, was to determine if the elements necessary for a conviction under s 39B of the DDA have been made out ie. whether there is proof of possession and trafficking.

Held:

[1] The chemist report was served on both the accused in compliance with s 399 of the CPC and as there was no notice given by the defence requiring the attendance of the chemist, the report is therefore accepted as conclusive evidence of its contents regarding type of drug and weight.

[2] The chemist report was tendered as substantive evidence under s 399 of the CPC and thus, the chemist is precluded from giving oral evidence in respect of his analysis of the drug. Otherwise, this would amount to admitting two sets of substantive evidence from the same witness. Moreover, where a chemist report is admitted under s 399 of the CPC, s 91 of the Evidence Act applies and the report would be 'required by law to be reduced to the form of a document'. And where this is so, by virtue of s 91 of the EA, no evidence shall be given in proof of the terms of the document except for the document (ie. the chemist report) itself. As a result of the above two reasons, the Court rules that the chemist would not be allowed to give oral evidence in respect of the conduct of her analysis.

[3] Before a statement may be admitted under s 32 of the EA, the condition precedent under the section must be satisfied ie. the maker of the statement must either be dead or cannot be found or has become incapable of giving evidence or that his attendance cannot be procured without unreasonable delay or expense. In the present case, the applicable preconditions would either be that the witness cannot be found or that the attendance of the witness cannot be procured without unreasonable delay or expense.

[4] The Court accepts the view expounded in *Sarkar's Law of Evidence* that if no diligent search and reasonable exertion were made to procure the witness's attendance, the precondition that the witness cannot be found is not satisfied. Mere ignorance as to the whereabouts of the witness is insufficient. In the case of *PP v. Said*, the Court held that where a person to be summoned cannot be found, the summons may be served under s 35(iv) of the CPC by leaving a copy of the summons with an adult member of the witness's family or with his servant residing with him. If this cannot be effected, the Court said that the prosecution should invoke s 36 of the CPC and affix the summons to some conspicuous part of the house in which the witness ordinarily resides. If this also fails, the prosecution may apply for a warrant of arrest under s 47 of the CPC. In the present case, the police merely tried to locate the witness at addresses which the police knew she was no longer keeping and this does not amount to a diligent or exertive attempt to procure the attendance of the said witness.

[5] As to the other precondition ie. that the attendance of the witness cannot be procured without unreasonable delay or expense, the same considerations as outlined above will be taken into account. Unless the prosecution proves that they had diligently and exertively attempted to locate the witness and were able to assess the chances of the success of procuring her, the Court would not be satisfied that the precondition has been satisfied. Therefore, none of the preconditions to s 32(1) of the EA has been satisfied and so the statement cannot be admitted.

[6] With regards the issue of whether the prosecution has proved the element of possession, the fact that both the accused were holding a packet of the drugs at the material time is highly significant. For possession to be made out, two elements must be satisfied ie. the accused must have been so situated that he can deal with the thing in question as if it belonged to him (the physical element) and it must also be shown that the accused had the intention of dealing with the thing as if it belonged to him (the mental element). Intention is a question of fact depending on the circumstances of the case. In the present circumstances, the physical element of possession is easily satisfied by the proximity of both the accused persons to the drug. The mental element of intention is also clearly satisfied by the fact that both the accused were actually handling the drug at the time of arrest hence they were dealing with it as if it belonged to them. Thus the Court is satisfied that both the accused had joint possession of all the drugs on the floor.

[7] As to the element of trafficking, if possession of more than 200 grammes of cannabis as defined in s 2 of the DDA is proved, there arises a presumption under s 37(da) of the DDA that the accused is trafficking in the said drug. Therefore, for the presumption to apply in the present case, the chemist report must conclusively state that the plant material weighs 200 grammes or more and that the plant material is cannabis as defined in s 2 of the DDA. The chemist report here however, merely stated that the material analysed was cannabis as defined in the DDA. No reference was made to s 2 and thus the chemist's report may be construed in two ways which is that the material examined could either be cannabis within the meaning of s 2 or cannabis (Indian Hemp) as listed in Part III of the First Schedule of the Act. If it is established that the drug is cannabis as defined in s 2, then the presumption under s 37(da) arises but if the material analysed is cannabis (Indian Hemp), no such presumption arises.

[8] In situations where there is a doubt as to which of the two constructions the Court should apply, the canon of construction applicable is this: where the Court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the Court should make a finding in the lower degree particularly where a finding in a higher degree will give rise to a mandatory sentence of death. Thus, the Court

amended the charge to the lesser charge of joint possession of cannabis (Indian Hemp) under s 12(2) of the DDA.

[9] As possession was proved and not denied by the accused persons, culpability under s 12(2) of the DDA is established. Due to the large quantity of drugs found which would have otherwise attracted the death penalty, the maximum punishment of 5 years is imposed.

Per curiam:

[1] Where a chemist gives oral evidence regarding his analysis of the drug, the chemist report prepared by him would be inadmissible. However, it may be tendered not as substantive evidence of its contents but as corroboration of his oral evidence pursuant to s 157 of the EA.

[2] Section 32(1)(i) and (j) of the EA are plainly disjunctive and are providing for two different circumstances. Proof of this is can be seen from the use of the word 'provisions' in s 32(2) of the EA thus denoting more than one. The use of 'where' in subsection (j) as opposed to 'when' which is used in subsections (a) to (i) does not lead to absurdity and so it should be interpreted according to its grammatical and ordinary sense. Similarly, the word 'and' which conjoins subsections (i) and (j), was clearly meant to connote the ending to all the provisions in s 32(1) and no more. In fact, the language in s 32(1)(i) and (j) is so plain that it renders the exercise of interpretation quite unnecessary.

[Accused persons convicted under amended charge]

Cases referred to:
Saw Thien Teik v Regina [1953] 19 MLJ 124 ***(foll)***
Public Prosecutor v Lin Lian Chen [1990] 2 CLJ 1020 ***(foll)***
Sim Tiew Bee v PP [1973] 2 MLJ 200 ***(refd)***
Public Prosecutor v Said [1984] 1 MLJ 50 ***(refd)***
Public Prosecutor v Michael Anayo Akabogu [1995] 3 MLJ 42 ***(not foll)***
Grey v Pearson [1857] 6 HLC 61 ***(refd)***
Chan Pean Leon v Public Prosecutor 1956 22 MLJ 237 ***(refd)***
Lee Chee Meng v Public Prosecutor [1992] 1 CLJ 345 ***(dist)***
Shukri bin Mohamad v Pendakwa Raya [1995] 3 AMR 2695 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss 107, 112, 180, 399(1)(b)
Dangerous Drugs Act 1952, ss 2, 12(2), (3), 37(d), (da), (da)(vi), 39B
Evidence Act 1950, ss 32(1)(i), (1)(j), (2), 91, 136, 157

Other sources referred to:
Sarkar's Law of Evidence, 14th Edn, p 649
Maxwell on Interpretation of Statutes, 11th Edn, p 6

For the first accused - Manjit Singh (Subramaniam with him); M/s Manjit Subra & Assoc.
For the second accused - Gurbachan Singh; M/s Bachan & Kartar
For the prosecution - Raja Rozela Raja Toran, DPP

JUDGMENT

Kang Hwee Gee J:

Both the accused in this case were charged jointly with common intention with the offence of trafficking in 663 grammes of cannabis under s 39B of the Dangerous Drugs Act 1952 an offence which carries the death penalty upon conviction.

Both the accused were arrested in a room at the upper floor of a double storey terrace house No. 17, Persiaran Cempaka Sari 8, Taman Cempaka, Ipoh, by a police party led by Chief Inspector Mohamad bin Yahya (PW4).

Upon entering the room which was shut but not locked PW4 and Detective Lance Corporal Amran b Hashim (PW5) found both the accused sitting on floor, each one holding a plastic packet containing plant materials. The 1st accused was only in his underpants while the 2nd accused was in his T-shirt and shorts.

Upon seeing them both the accused dropped the packets they were holding in their hands on to sheets of newspaper which was spread in front of the 1st accused on the floor and which contained more of the same plant materials. A large quantity of the same plant materials in plastic packets and other incriminating exhibits were also found on floor near the accused, the details of which will be described later in this judgment.

The relative positions of the lots of plant materials recovered is best depicted by the photographs Exhibit P5 A to D which was taken *in situ* by police photographer Detective Lance Corporal Naimuddin b Hassan (PW2) before they were removed.

Two other occupants of the house at the time were also arrested along with the accused. They were Yap Peng Kheong (PW8) who was found in the middle room and Yap Chee Kheong who was found in the back room on the same floor. The latter could not now be traced.

According to Doong Neng Sing (PW7) the caretaker and representative of the proprietor of the house, the house was let to one Madam Lam Siew Yong. At the time of incident when the police party entered the house she was downstairs at the sitting room area. A statement under s 112 of the CPC was subsequently recorded from her but she could not now be traced and therefore could not be subpoenaed to give evidence at the trial. Consequently, the prosecution applied to tender her statement as evidence under s 32(1)(i)

of the Evidence Act 1950, which was disallowed for reasons which I shall revert to later.

The plant materials were subsequently analysed by the Government Chemist Lam Yoke Ching, whose report Exhibit P32 confirms that they were cannabis as defined in the Dangerous Drugs Act 1952 with the total weight of 663 grammes.

The report however did not state specifically that the plant materials analysed were cannabis as defined in s 2 of the Act.

At the close of the case for the prosecution I found it necessary (for reasons which I shall revert to later in this judgment) to amend the charge against both the accused to one of possession simpliciter of cannabis (Indian Hemp) under s 12(2) of the Dangerous Drugs Act 1952. The accused were called to enter their defence on the amended charge which read as follows:

> Bahawa kamu dengan niat yang sama pada 8.4.1994 jam lebih kurang 11.30 pagi di bilik hadapan tingkat atas rumah No 17, Persiaran Cempaka Sari 8, Taman Cempaka, Ipoh dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan, telah memiliki dadah berbahaya iaitu cannabis dengan beratnya 663 gram dan oleh yang demikian, kamu secara bersama telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah seksyen 12(3) Akta yang sama dibaca dengan seksyen 34 Kanun Kesiksaan.

They chose to remain silent. Consequently, they were found guilty and convicted and sentenced to five years imprisonment with effect from their date of arrest. Before I state my ground, I shall first deal with two applications made in the course of the trial by the prosecution.

Application by Prosecution to Call Chemist to Clarify Report

The chemist report Exhibit P32 had been served on both the accused by the investigating officer in compliance with the ten clear days requirement under s 399 of the Criminal Procedure Code. As the defence had not given any notice under s 399(1)(b) to require the attendance of the chemist, the report must therefore be accepted as conclusive evidence for the prosecution of the finding of the chemist with respect to the nature of drug recovered and its total weight. When the learned Deputy Public Prosecutor proposed to call the same chemist to give evidence, I had to act under s 136 of the Evidence Act 1950 to require her to state in what manner the evidence she proposed to elicit from the chemist would be relevant. On being informed that the chemist would be called to explain the conduct of her analysis in the drug, I ruled that the chemist if called would not be allowed to give any evidence in respect of the conduct of her analysis of the drug, for the following reasons:

(i) The chemist report had already been admitted into evidence.

It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as a substantive evidence of its contents but as corroboration of his oral evidence in court under s 157 of the Evidence Act 1950 (see *Saw Thien Teik v. Regina* [1953] 19 MLJ 124, followed in *Public Prosecutor v Lin Lian Chen* [1990] 2 CLJ 1020). Conversely, if the chemist report has been tendered as substantive evidence under s 399 of the CPC, it follows that no oral evidence can be given by the chemist in respect of his analysis of the drug. To allow the chemist to give such evidence would tantamount to allowing the admission of two sets of substantive evidence from the same witness which the prosecution would not have otherwise been entitled to do had they called the chemist to give oral evidence.

(ii) Section 91 of the Evidence Act 1950 applies.

A chemist report is not *per se* a "matter" required by law to be in the form of a document as in the case of a police report under' s 107 and a statement under s 112 of the Criminal Procedure Code. But once the chemist report had been admitted as substantive evidence under, s 399 of the Code it falls squarely into that class of matter "required by law to be reduced to the form of document" under s 91 of the Evidence Act 1950. It would not therefore be permissible by the operation of s 91 for the prosecution to give any other evidence in proof of the matter except the document (the chemist report) itself.

Application to Tender the Statement of Madam Lam Siew Yong as Evidence:

Section 32(1)(i) of the Evidence Act 1950 reads,

> Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
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> [(a) to (h) not relevant].
>
> (i) when the statement was made in the course of, or for the purpose of, an investigation or inquiry into an offence under or by virtue of any written law; and
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> (j) where the statement was made by a public officer in the discharge of his duties.
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> (2) The provisions of paragraphs (i) and (j) of sub-section (1) shall apply only in relation to a criminal proceeding.

The prosecution relied on the following attempts to trace the witness to invoke the provision of s 32(1)(i):

1. On 24.4.95 at about 10.00 am Lance Corporal Rohani bin Mohamed Nor (PW10) went to house No. 17, Sari 8, Taman Cempaka to serve a subpoena on the witness. He was informed by an occupant of the said house that the witness was not an occupant of that house. He visited the same house again on 25.5.95 and 13.10.95 but failed to trace the witness

2. In November 1995 the Investigating Officer, Assistant Superintendent of Police, Umar Ali Saifuddin bin Shahruddin (PW3) tried to trace (mengesan) the witness at the house of incident but discovered that she was no longer staying in that house. In April 1995 just before this trial commenced he made enquiries by phone to the Jabatan Pendaftaran Negara at Kuala Lumpur and obtained the witness' old address No. 26B, Jalan Raja Laut, Kuala Lumpur. Following an enquiry he made to the Dang Wangi Police Station, Kuala Lumpur, he was informed that the witness was not staying at the said address. He also ascertained from the Immigration Department, Perak that no passport had been issued to the witness.

3. On 10.4.96 at about 9.50 am Lance Corporal Othman bin Saidin (PW9) called at No. 15 Sari 24, Taman Cempaka, Ipoh to trace the witness. He was informed by an occupant of the house that he did not know the witness.

It was held in the Federal Court case of *Sim Tiew Bee v PP* [1973] 2 MLJ 200 that before the Court could admit the statement of a witness as evidence under s 32, the condition precedent contemplated under the section must be satisfied. The condition precedent that the prosecution ought to satisfy in the present case was either to prove that the witness cannot be found or that her attendance cannot be procured without an amount of delay or expense. The learned authors of *Sarkar's Law of Evidence* 14th Edn at p 649 state (relying on Indian authorities) that where no diligent search and reasonable exertion were made to procure the witness the Court could not come to a finding that the witness cannot be found therefore his statement could not be admitted under the section. Mere ignorance of the whereabout of the witness is not sufficient to invoke the section. As the interpretation appears to be somewhat sound, I will for the present case adopt their view. It stands to reason that unless stringent conditions are prescribed and fulfilled the established rule against the reception of hearsay evidence would be eroded; Courts would have to accept as evidence statements which may not stand the vigours of cross-examination had the maker been called to give evidence.

In *Public Prosecutor v Said* [1984] 1 MLJ 50 at 51 Mohamed Azmi J (as he then was) observed that:

> If a particular witness is material to the prosecution's case it is the duty of the police to keep track of his whereabouts and take all precautionary measures that they be informed of any change of address. Under s 34(ii) Criminal Procedure Code, the responsibility of serving summons or subpoenas on accused and

witnesses are with police officers unless the court otherwise directs. If a particular witness is very material to the prosecution case, it stands to reason that the police must exercise extra diligence in applying for summons early and in taking all necessary steps to ensure that the correct address of the witness has been obtained bearing in mind the unreliability nowadays of the address given in identity cards. The correct address of material witnesses should be obtained at the first opportunity and, if necessary, the police can invoke ss 111 and 112 Criminal Procedure Code at the investigation stage. Section 111 empowers the police to require their attendance at the police station so that they can be questioned under s 112. If they do not attend, then under subsection (ii) of s 111, they may be compelled to attend by a Magistrate. (See *Chong Fook Kam & Anor. v. Shaaban & Ors.* [1968] 2 MLJ 50, 54). Where the person to be summoned cannot by the exercise of due diligence be found, then under s 35(iv) Criminal Procedure Code, the summons may be served by leaving a copy thereof for him with some adult member of his family or with his servant residing with him. If service under s 35(iv) cannot be effected, then the prosecution should invoke s 36 Criminal Procedure Code by affixing a copy of the summons to some conspicuous part of the house or other place in which the person summoned ordinarily resides, if so directed by the court. When a witness fails to appear in court after being served under s 35 or 36, the prosecution are then entitled to apply for warrant of arrest under s 47. In the present case, it would appear that none of these powers given by the Criminal Procedure Code to compel appearance of the two material witnesses had been exhausted by the police, either in the first or second prosecution.

In the present case it is clear to me that no diligent or exertive attempt had been made to procure the witness. The fact that the witness was no longer staying at the place of incident or at her former address in Kuala Lumpur was already known to the investigating officer as long ago as November 1995. Yet no attempts were made beyond trying to locate her at addresses the police knew she was no longer keeping.

The requirements proposed in *Public Prosecutor v Said* may appear stringent and cumbersome. But these are prescribed avenues under the Criminal Procedure Code which the prosecution must go through to trace a witness, without which the Court may not be able to act to admit statement under s 32 of the Act.

The some consideration would apply to the other condition precedent. Unless it is proved to the satisfaction of the court that they had diligently and exertively attempted to locate the witness and were able to assess the chances of the success of procuring her, there could be no basis to find that she could not be procured without an amount of delay or expense. Accordingly, I had to refuse the prosecution's application.

While still on the subject it may be appropriate for me to consider a salient point raised by the defence in respect of the interpretation of s 32(1)(i) and (j) although the issue would now be academic as I had already disallowed

the prosecution's application. In *Public Prosecutor v. Michael Anayo Akabogu* [1992] 3 MLJ 12 the High Court at Penang held that the two subsections must be read conjunctively. In the event counsel submitted that the prosecution could not rely on s 32(1)(i) to admit the statement of Lam Siew Yong as she was not an officer discharging any duty, reading the subsections conjunctively. The rationale of that interpretation appears in the following passage of the judgment.

> A disjunctive reading of s 32(1)(i) will therefore be too great a breach, and an unacceptable inroad to the hearsay rule. It is trite that penal provisions are to be narrowly construed; if arguably ss 32(1)(i) and (j) are not penal provisions then undoubtedly they are provisions leading to proof in a criminal proceeding and conviction of an offence. The infirmities, ambiguities and defects in the language the inserted provisions, must therefore be narrowly, construed, but a disjunctive reading of the inserted sub-sections would give to it a wider interpretation than the natural meaning and impact of the language used.
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> Sub-sections 32(1)(i) and (j) are conjoined by 'and' between it, conspicuously absent in s 32 (pre-amendment) in cases (a)-(h). Brought in together, the intention of the legislature was therefore to bind the two inserted sub-sections, which incidentally is the only way it could be rationalized with reason (a) underlining s 32.
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> There is reason further for this conjunctive construction. Each of the eight cases in s 32 (pre-amendment) is preceded by the word 'when', the signature word to mark out the contingency, and s 32(1)(i) is similarly preceded by 'when'; the singular exception being s 32(1)(j) preceded by 'where'.
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> The same word in the same provision must carry the same meaning, and if indeed it was intended for s 32(1)(i) and (j) to be read disjunctively, the legislature would surely have followed the proven format and language of s 32 (pre-amendment), and s 32(1)(j) would be preceded by 'when' just as in the other nine cases.
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> This departure from the proven term 'when' denoting a separate case and the introduction of 'and' between (i) and (j) singled out s 32(1)(j) for special application. Sub-sections 32(1)(i) and (j) were therefore specifically inserted as a joint package to be read conjunctively, an interpretation fortified by the provisions of s 32(2) that it shall apply only to criminal proceedings, quite unlike the rest of the provisions of s 32 that apply to all proceedings.
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> Conjoined by 'and', s 32(1)(j) qualifies that a statement under s 32(1)(i) must be one where the statement was made by a public officer in the course of his duties.

With respect, I do not share the same view. I cannot see why the two subsections should be read conjunctively when they are plainly disjunctive. They provide for two different situations when s 32 can be invoked. Section 32(1)(i) was meant to apply to statements made by any person in the course of or for the purposes of an investigation or inquiry into an offence. Such a situation envisaged the giving of statements to someone authorised by law to take them while investigating or inquiring into an offence. On the other hand

subsection (1)(j) was meant to apply to statements made by a public officer in the discharge of his duties as in the case of a medical officer who examined a patient and had to write out his diagnosis and prognosis to be kept as the patient's medical record. In the event that the medical officer cannot be called to give evidence in a subsequent criminal trial which requires evidence of the patient's state of health, his statement (the patient's medical record) cannot be admitted under sub-section 1(i) because the statement was not made in the course of or for the purpose of an investigation or inquiry into an offence, but could be admitted under subsection (1)(j) being statements made by him in the discharge of his duty.

Consider this scenario: A firearm had been used in the commission of a murder. It was required to prove that the weapon was owned by a certain person who committed the offence. An entry in the firearms register kept by a police licensing officer may be admitted to show that the firearm was issued to that person under subsection (1)(j) as statement made by a public officer in the course of his duty but not made under subsection (1)(i) as the statement was not made in the course of investigation or enquiry into an offence.

That the two subsections were meant to be disjunctive and to provide for two different situations is clear discernible from the following subsection (2) which uses the word "provisions" in the plural and not in the singular.

The use of "where" in subsection (1)(j) does not appear to me be inconsistent with "when" in (a) to (j) as to lead to absurdity or repugnancy that would require an approach beyond applying the literal canon of interpretation as expressed in the oft-cited passage of Lord Wensleydale in *Grey v Pearson* 1857 6 HLC 61 as quoted in *Maxwell on Interpretation of Statutes* 11th Edn at p 6 as follows:

> In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

Similarly, the word "and" which joins subsection (1)(i) to subsection (1)(j) could admit of no more significance than an exposition of the draftsman's preference of a conjunction as an ending to all the provisions in subsection (1) of s 32. It is clear to me that the language used in s 32(i) and (j) is so plain that it is hardly necessary to embark on the task of interpretation. *Absoluta sententia expositore non indiget* (it is not allowable to interpret what has no need of interpretation).

I could not therefore accept Counsel's submission on this point.

The Substantive Issues: Has the Prosecution Proved Possession?

A salient feature one must bear in mind in the present case is the fact that each of the accused had been observed to have been having in his hand a packet containing the drug at the time when the police party entered the room. This was clear from the uncontradicted evidence of the main witnesses of the prosecution PW4 and PW5, which I must accept. The accused were comfortably seated on the floor surrounded by a large amount of drugs when the police entered the room. Spread on the floor around them were a large amount of the drug in plastic packets. There were 430 stapled plastic packets and 78 open plastic packets. On top of some sheets of Chinese newspaper was another quantity of the same drug in loose form together with another 37 open plastic packets of the drug. A quantity of empty plastic packets were also found on the floor. Each accused was seen holding in their hands an open packet of the drug which they dropped onto the newspaper on becoming aware of the presence of the police. A wallet containing among other items, an identity card, a bank card and a driving licence belonging to the 1st accused was also recovered from the floor.

In the circumstances under which the drugs were found relative to the positions both the accused were in, there could be no doubt in my mind that they had joint possession of all the drugs on the floor around them. I would therefore have to find that the prosecution had at the close of its case proved that they were in joint possession not only of the drugs held in their hands but also all the drugs on the floor.

As authority, I need to quote *in extenso* the *oft* cited passage of Thompson J in *Chan Pean Leon v Public Prosecutor* 1956 22 MLJ 237:

> 'Possession', itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edn), page 304:
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> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surroundings circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I

> intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

In the instant case, both the physical element (proximity to the drug) as well as the mental element (the intention of dealing with it as if it belonged to them) as envisaged in *Chan Pean Leon* (*supra*) were clearly present. The fact that there were other occupants in the house (in two other rooms) on the same floor and another at the hall downstairs at the time of their arrest would not change their status as joint possessors of the drug. Further, the fact that they may not be the permanent occupiers of the room would not make any difference. They were alone in that room and were the sole occupiers for that duration of time sufficient for possession under the circumstances to be attributed to them.

Lest I be misconstrued, I must state here that the circumstances from which possession could be inferred in the instant case were different from those line of cases which decides on the exclusivity of possession, notably the Supreme Court case of *Lee Chee Meng v. Public Prosecutor* [1992] 1 CLJ 345. In that case drugs were recovered from a vanity case and a shoe box in a room occupied by two persons. It was held *inter alia* that there could be no custody or control (and therefore no presumption of possession under s 37(d)) as the room in which the drugs were recovered was accessible to their friends who frequently visited them. Unlike *Lee Chee Meng*, in the instant case the drugs were not just recovered from places in the room. They were recovered from the floor around both the accused who were seated and handling them at the time from which one could legitimately draw the inference that they were in the joint possession of the accused.

Has the Prosecution Proved the Charge of Trafficking?

Having proved possession, the prosecution would have to rely entirely on the chemist report to invoke the presumption under s 37 (da) to prove trafficking.

To successfully apply this presumption the chemist report must conclusively. show that not only the weight of the plant materials weighed 200 grammes or more but also that they were cannabis under s 37 (da)(vi).

In the recent case of *Shukri bin Mohamad v Pendakwa Raya* [1995] 3 AMR 2695 the Federal Court held that where the chemist gave evidence that the drug he analysed was "cannabis as defined in the Dangerous Drugs Act" without referring to s 2 of the Act, his analysis could give rise to the inference that he did not have in mind the ingredients of cannabis as defined therein. It was therefore open to construction that the plant materials examined by the chemist could either be cannabis within the meaning of s 2 of the Act or cannabis (Indian Hemp) as listed in Part III of the First Schedule of the Act. But whereas there could be a presumption of trafficking in respect of possession of cannabis exceeding 200 grammes under s 37 (da) of the Act, no such presumption could operate in respect of possession of cannabis (Indian Hemp), as cannabis (Indian Hemp) is not included in the subsection. In the event the court applied the canon of construction that "where the Court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness the Court should make a finding in the lower degree particularly where a finding in a higher degree will give rise to a mandatory sentence of death." It substituted the conviction of trafficking in cannabis under s 39 B of the Act for one of possession of cannabis (Indian Hemp) under s 12(2) and sentenced the accused in that case to the maximum term of five years imprisonment under s 12(3).

Shukri's case involves the infirmities in the oral testimony of a chemist. But the same principle should apply to such evidence introduced through a chemist report under s 399 of the Criminal Procedure Code as in the present case which also made no reference to s 2 of the Act. By not referring to cannabis as defined in s 2 of the Act, the report was clearly infirm thereby opening to construction (as in the *Shukri's* case) that the drug analysed could either be cannabis or cannabis (Indian Hemp). Applying *Shukri*, I must pursuant to s 180 of the Criminal Procedure Code so find that the prosecution had made out a case only of the lesser charge of joint possession of cannabis (Indian Hemp) under s 12(2) of the Act and call them to enter their defence on the lesser charge of joint possession of cannabis (Indian Hemp) under s 12(2) of the Act. Hence the amendment.

For the large amount of drugs that was found in the joint possession of the accused which would have otherwise attracted the death penalty, the least sentence for an offence of a lesser degree of seriousness that the Court could pass would as in the *Shukri's* case have to be the maximum five years allowable under s 12(3) of the Act to take effect from their date of arrest.

Reported by S. Dharmendran